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Ser 13/2EG12106.03
6 Aug 03

From: Deputy Assistant Judge Advocate General (Administrative Law)
To: Ethics Counselors

Subj: ETHICS-GRAM 03-11 - NOTICE OF PROFESSIONAL RESPONSIBILITY COMMITTEE
ADVISORY OPINION

Ref: (a) JAGINST 5803.1B, encl. (1)

Encl: (1) PRC memo 5803 Ser 13/2PR11258.03 of 21 Apr 03

1. Purpose. The purpose of this ethics-gram is to provide notice and practical application of a recent formal advisory opinion issued by the Professional Responsibility Advisory Committee (PRAC).

2. Background. On 21 April 2003, the Judge Advocate General approved the opinion concerning responsibilities of covered attorneys¹ and legal personnel when asked whether a member visited a judge advocate's office or otherwise met with a judge advocate to obtain legal services. The PRAC determined that once an attorney-client relationship is established, covered attorneys and their legal assistants, both military and civilian, ordinarily are not authorized to disclose appointment information. A copy of this opinion is provided as enclosure (1).

3. Discussion. Below you will find a synopsis of the PRAC opinion followed by practical illustrations:

a. Confidentiality of Client Information. Rule 1.6 of reference (a) states, "a covered attorney shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs b and c."² The PRAC determined a covered attorney and his or her legal assistants³ are bound by the nondisclosure provision of Rule 1.6 upon the formation of an attorney-client relationship. When this relationship is created, information concerning the service member's appointments or meetings with the covered attorney or legal staff assistant qualifies as information relating to the

¹ Covered attorneys are defined in JAGINST 5803.1B, ¶ 4(b).

² Paragraph b of Rule 1.6 generally mandates disclosure of information to prevent certain categories of future crimes involving imminent death, substantial bodily harm, or significant impairment of national security or military readiness. Paragraph c of Rule 1.6 authorizes disclosure of information to allow an attorney to respond to allegations about the attorney's defense of a client or to respond to matters relating to a claim or defense the attorney may have concerning an issue involving the client.

³ The PRAC found specifically that Rule 5.3 of reference (a) requires covered attorneys to make reasonable efforts to ensure legal assistants working under their supervision comply with the professional obligations of covered attorneys, including the Rules of Professional Responsibility. Rule 1.6, therefore, applies by extension to all legal assistants, military and civilian, working in support of covered attorneys who form attorney-client relationships as part of their official duties.

Subj: ETHICS-GRAM 03-11 - NOTICE OF PROFESSIONAL RESPONSIBILITY COMMITTEE
ADVISORY OPINION

representation of a client under Rule 1.6. Such information may not be disclosed unless an exception applies or the client gives informed consent.

b. Consent. Covered attorneys should discuss the Rule 1.6 prohibitions on disclosure of information with their clients upon forming an attorney-client relationship. There may be times when disclosure of appointment information is in the client's interest and could even facilitate a client's attendance at appointments. For example, a command may wish to confirm an appointment prior to allowing a servicemember time-off to attend the appointment. In such a case, the client may provide informed consent to the disclosure of appointment information. If a covered attorney refuses a command request to provide appointment information, relying on Rule 1.6, that attorney should discuss such refusal with the client to determine whether disclosure is in the client's interest and whether the client wishes to consent to such disclosure.

c. Formation of Attorney-Client Relationship

(1) Rule 1.2 of the reference allows covered attorneys to form attorney-client relationships only when authorized by competent authority. The PRAC opinion notes, however, that counsel who have not received such authorization but yet engage in confidential communications have still formed a valid attorney-client relationship subject to the non-disclosure rule. The opinion cautions judge advocates to assess whether an attorney-client relationship was formed before responding to inquiries about a service member, even if no formal authorization to establish such a relationship was granted.

(2) The PRAC also specifically notes that, regardless of whether an attorney-client relationship is formed, a judge advocate or legal assistant may not provide false information in response to inquiries about the location of service members. Judge advocates who have formed an attorney-client relationship are advised simply to inform the requestor of their ethical obligation.

d. Applicability. This opinion is limited to the responsibilities of judge advocates and their assistants when responding to inquiries concerning client appointment information. It does not affect the command's ability to use other means to account for a member's time. For example, commands may choose to escort members for legal appointments or maintain a command logbook at the legal office and direct members to sign-in upon arrival. Likewise, this opinion does not prohibit an attorney from signing-in at the brig when visiting a client. Finally, even when protected from disclosure, sharing appointment information with the command might be in the client's best interest. Where this is the case, the attorney should advise the client accordingly and seek consent to disclose such information.

e. Scenarios. The following scenarios illustrate how the nondisclosure rule applies to covered attorneys:

Subj: ETHICS-GRAM 03-11 - NOTICE OF PROFESSIONAL RESPONSIBILITY COMMITTEE
ADVISORY OPINION

(1) A local command XO, CDR Taylor, contacts a Naval Legal Service Office (NLSO) and asks LN1 Smart if he can verify that SR Smith met with LT Jones that morning. LN1 Smart knows that SR Smith met with LT Jones and received advice about the imposition of NJP. Application of PRAC opinion: Although LN1 Smart is aware that an attorney-client relationship typically would not be formed at this juncture, he cannot be certain as to whether such a relationship was in fact established during the meeting. LN1 Smart, therefore, must advise CDR Taylor that he cannot provide any information concerning service members' appointments with legal counsel as such information may be confidential under the Rules of Professional Conduct. LN1 Smart should refer CDR Taylor to LT Jones.

(2) Not discouraged, CDR Taylor asks LN1 Smart if he can simply confirm whether SR Smith showed up at the NLSO instead of whether he met with LT Jones. Application of PRAC opinion: LN1 Smart must reiterate that any information concerning service members' appointments may be confidential and should again refer CDR Taylor to LT Jones.

(3) CDR Taylor, not pleased with the response from LN1 Smart, contacts LT Jones and asks if he met with SR Smith that morning and, if so, what time the meeting concluded. Application of PRAC opinion: LT Jones must determine if he formed an attorney-client relationship with SR Smith before he responds to CDR Taylor's inquiry. If LT Jones determines a relationship was formed, LT Jones must advise CDR Taylor that he is prohibited by the Rules of Professional Responsibility from discussing appointment information or other information relating to his representation of a client (i.e., he cannot provide any information as to whether he did or did not meet with SR Smith). If LT Jones assesses that he did not form an attorney-client relationship with SR Smith, he may answer CDR Taylor's questions without violating his ethical obligations.

(4) LT Jones assesses that he formed an attorney-client relationship with SR Smith and advises CDR Taylor that his ethical obligations prohibit him from disclosing information related to the representation of a client, including appointment information. CDR Taylor, audibly distressed, orders LT Jones to tell him if he met with SR Smith that morning, noting he will consider refusal as failure to obey a lawful order. Further, CDR Taylor informs LT Jones that, absent information to the contrary, he will be forced to take disciplinary action against SR Smith. Application of PRAC opinion: LT Jones must respectfully decline to answer CDR Taylor's question and remind him of his ethical obligation not to disclose appointment information. LT Jones may also wish to refer CDR Taylor to his XO, CDR Backstop. As a practical matter, LT Jones may wish to speak with his client to discuss whether it is in his best interest to consent to disclosure of this information.

(5) BM2 Jilted runs into LT Options, a local NLSO legal assistance officer, at the base exchange after normal working hours. She notices the LT's JAG Corps collar device and quickly initiates a conversation about her

Subj: ETHICS-GRAM 03-11 - NOTICE OF PROFESSIONAL RESPONSIBILITY COMMITTEE
ADVISORY OPINION

unfaithful spouse and her desire for a quick divorce. LT Options gives BM2 Jilted some basic guidance about divorce procedures but tells her to make an appointment during normal business hours the next day. Upon LT Options' return to her office in the morning, Master Chief Strong, BM2 Jilted's command master chief, contacts her by telephone and asks if BM2 Jilted has requested legal assistance. Application of PRAC opinion: LT Options must first determine whether she formed an attorney client relationship with BM2 Jilted during the conversation at the exchange. If so, the PRAC opinion applies and disclosure of appointment/contact information is prohibited, even though the meeting between counsel and client took place outside of NLSO spaces. If no attorney-client relationship exists, LT Options may disclose BM2 Jilted's appointment information.

(6) LN1 Harris, assigned to USS ALWAYSINPORT, makes an appointment for IT3 Sikes to receive NJP advice from LT Solo at the local NLSO. LN1 Harris later contacts the NLSO CMC and asks whether IT3 Sikes arrived on time for the appointment. In fact, IT3 Sikes left the ship but did not come to the NLSO. Application of PRAC opinion: NLSO CMC must first ascertain whether anyone within the NLSO has an attorney-client relationship with IT3 Sikes. If an attorney-client relationship exists, no appointment information may be provided. If no such relationship exists, the NLSO CMC may inform LN1 Harris that IT3 Sikes did not arrive at the NLSO as scheduled.

4. Points of contact. LCDR Barb Hanna at DSN 664-8280, (703) 604-8280, barb.hanna@navy.mil or LT Scotch Perdue at DSN 664-8201, (703) 604-8201, scotch.perdue@navy.mil. Marine judge advocates may contact JAR at (703) 614-2510.

/s/

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